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No. 327

Supreme Court of the United States

OCTOBER TERM—1942

FRED FISHER MUSIC CO. INC. and GEORGE GRAFF, JR.,

Petitioners,

against

M. WITMARK & SONS,

Respondent.

BRIEF FOR PETITIONERS

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This cause comes before this Court upon writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted October 12, 1942 (R. 117).

The Decision Below

The opinion of the Circuit Court of Appeals is reported in 125 Fed. (2d) 949 (R. 75). There was a dissent by Judge Frank (125 Fed. (2d) 954 (R. 85)).

The Circuit Court of Appeals affirmed an interlocutory decree of the District Court for the Southern District of New York which granted to the respondents (plaintiffs below) an interlocutory injunction in a copyright infringement case.

Jurisdiction of the Court

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Section 347(a)).

Statement of the Case

This case involves the construction of the renewal provisions of the Copyright Act of 1909 (17 U. S. C. A., Section 23). As stated by Judge Clark, writing for the majority in the Circuit Court of Appeals (R. 75, 125 Fed. (2d) 949):

> "We are presented with a question of statutory construction which has apparently never arisen before, though the general statutory provision has existed for over a hundred years. Simply stated, the problem is whether or not a copyright holder may assign his expectancy of the renewal right which arises under 17 U. S. C. A. § 23 at the expiration of the original twenty-eight year copyright grant."

The subject matter of the suit is the ownership of the author Graff's interest in the renewal copyright to the song "When Irish Eyes Are Smiling", which was originally copyrighted in 1912 and which became available for renewal in 1939.

The respondent claims ownership under an agreement made in 1917, twenty-two years before the renewal could be obtained or applied for, and also under an agreement made in 1910, two years before the song was written.

Petitioners contend that since Section 23 of the Copyright Law (17 U. S. C. A.) created the renewal term and limited the right to apply for it to the author or his family for the purpose of protecting them against an improvident disposition of the renewal copyright prior to its accrual, the assignments under which respondent claims are void and unenforceable.

The majority of the Circuit Court of Appeals (Judges Clark and A. N. Hand) sustained the validity of the anticipatory assignment; Judge Frank dissented.

The Facts

1. In 1912, the petitioner Graff, in collaboration with Ernest R. Ball and Chauncey Olcott, wrote the song "When Irish Eyes Are Smiling" (R. 16; 51).

2. It was published and copyrighted by the respondent on August 12, 1912 (R. 29).

3. Two years prior thereto, on July 1, 1910, Graff had agreed to sell to the respondent, on a royalty basis, all songs written by him during the next succeeding five years, "with renewals and with right to copyright and renew" (Exh. B, R. 25-28).

4. In 1917, Graff, who was then in financial straits, entered into an agreement with the respondent, whereby he released to the respondent all his right, title, interest and royalties in sixty-nine songs, including "When Irish Eyes Are Smiling", for the sum of $1,600.00 (R. 51; Exh. D; R. 29-33)—an average price of approximately $23 per song.

This agreement purported to sell to the respondent, in addition to the royalties still to accrue on the songs, the renewals of copyright thereon. It provided (R. 31-32):

> "And I do, for myself, my heirs, executors, administrators and next of kin, hereby irrevocably authorize and appoint the Publisher, its successor, successors and assigns, my attorneys and representatives, in my name or in the names of my heirs, executors, administrators and next of kin, or in its own names to take and do such actions, deeds and things, and make, sign execute and acknowledge all such documents as may from time to time be necessary to secure to the Publisher, its successor, successors and assigns, the renewals and extensions of the copyrights in said compositions and all rights therein for the terms of such renewals and extensions. And I agree,

for myself and for my heirs, executors, administrators and next of kin, upon the expiration of the first term of any copyright in said compositions, in this or in any other country, to duly make, execute, acknowledge and deliver or to procure the due execution, acknowledgment and delivery to the Publisher, its successor, successors or assigns, of all papers necessary in order to secure to it the renewals and extensions of all copyrights in said compositions and all rights therein for the terms of such renewals and extensions."

5. Under Section 23 of the Copyright Act, the time for filing an application for the renewal copyright to the song "When Irish Eyes Are Smiling" commenced on August 12, 1939, the beginning of the twenty-eighth year of the first term of copyright.

6. On August 12, 1939, the respondent applied for and registered the renewal copyright in the names of the petitioner Graff and Mrs. Olcott (the widow of Chauncey Olcott who had died prior to August 11, 1939) (R. 5, 18, 33).

7. That same day, the respondent, as Graff's attorney in fact under the 1917 agreement, assigned to itself Graff's interest in the renewal copyright (Exh. F, R. 33-34). (Mrs. Olcott assigned her interest to the respondent on August 28, 1939 (Exh. G; R. 34-35). The validity of her renewal and her assignment is not in dispute.)

8. Petitioner Graff himself applied for the renewal on August 23, 1939, and, after registering it in his own name (R. 19; Exh. H, R. 35-36), assigned his interest to the petitioner Fred Fisher Music Co. Inc. (Exh. I, R. 36).

9. Mrs. Ball, as the widow of Ernest R. Ball, who had died prior to August 11, 1939, applied for and registered the renewal copyright in her name on November 15, 1939

(Exh. J, R. 19, 36, 37), and assigned her interest to the defendant Mills Music, Inc. on July 8, 1940 (Exh. K, R. 37-38). As in the case of Mrs. Olcott, the validity of Mrs. Ball's renewal copyright and her assignment to Mills Music, Inc. is not in question in this proceeding.

10. The respondent, claiming the ownership of the renewal copyright, commenced an action for infringement against the petitioners, Graff and Fred Fisher Music Co. Inc., and Mills Music, Inc.

11. Simultaneously with the commencement of the action, the respondent moved for an injunction pendente lite against the petitioners, Graff and Fred Fisher Music Co. Inc. (R. 1, 2). However, no preliminary injunction was sought against the defendant Mills Music, Inc., it being stated that this defendant did not threaten immediate publication of the song (R. 2).

12. The motion for temporary injunction against petitioners was granted by the United States District Court for the Southern District of New York and the petitioners were, during the pendency of the action, enjoined from printing publishing, copying or vending the song "When Irish Eyes Are Smiling" or licensing the use thereof or asserting any claim or interest in the renewal copyright thereof (R. 64-66). District Judge Conger's opinion appears at pages 66-72 of the record and is reported in 38 Fed. Supp. 72.

13. The interlocutory decree was affirmed by the United States Circuit Court for the Second Circuit, Judge Frank dissenting with opinion. Judge Clark's majority opinion appears at pages 75-85 of the record, Judge Frank's at pages 105-115; both opinions are reported in 125 Fed. (2d) 949, 954.

SUMMARY OF ARGUMENT

POINT I

THE LIMITATION IN SECTION 23 OF THE COPYRIGHT LAW OF 1909 RESTRICTING THE RENEWAL PRIVILEGE TO THE AUTHOR AND HIS FAMILY WAS DESIGNED TO PREVENT THE ALIENATION OF THE RENEWAL COPYRIGHT PRIOR TO THE TWENTY-EIGHTH YEAR OF THE ORIGINAL TERM.

A. Copyright is the creature of statute, hence the privileges extended and the persons to whom they are available must be determined by the provisions of the Copyright Law.

B. The renewal privilege is a new grant available only to the persons specifically designated in the statute.

C. Section 23 of the Copyright Law was designed to enable authors and their families to derive an economic benefit in the twenty-eighth year of the original term, unfettered by prior commitments.

POINT II

THE HISTORY OF COPYRIGHT LEGISLATION IN THE UNITED STATES FORTIFIES THE VIEW THAT THE RENEWAL PRIVILEGE MAY NOT BE ALIENATED BY AN ANTICIPATORY ASSIGNMENT OR AGREEMENT TO ASSIGN.

POINT III

THE POLICY OF THE STATUTE TO LIMIT THE RENEWAL PRIVILEGE TO THE AUTHOR AND HIS FAMILY NULLIFIES ANY AGREEMENT BY WHICH A THIRD PERSON SEEKS TO ACQUIRE IN ADVANCE OF THE TWENTY-EIGHTH YEAR THE BENEFITS INTENDED TO BE RESERVED TO THE AUTHOR AND HIS FAMILY ALONE.

A. The limitation by which only the author may apply for the renewal is not a mere technicality or functional impediment which may be overcome by legal devices. It is an obstacle imposed by the statute to safeguard the author against his improvident act.

B. The doctrine that the law favors alienability of property lends no support to the contention that the renewal may be disposed of by an author in advance of the twenty-eighth year. The statute is so framed that at no time before the twenty-eighth year can a complete title be conveyed.

POINT IV

THE CASE IS ONE OF FIRST IMPRESSION.

POINT V

THE INTERLOCUTORY JUDGMENT APPEALED FROM SHOULD BE REVERSED; THE DECREE PENDENTE LITE VACATED AND SET ASIDE; AND THE CASE REMANDED WITH INSTRUCTIONS TO DENY RESPONDENT'S MOTION FOR A TEMPORARY INJUNCTION.

POINT I

The Limitation in Section 23 of the Copyright Law of 1909 Restricting the renewal privilege to the author and his family was designed to prevent the alienation of the renewal copyright prior to the twenty-eighth year of the original term.

A. Copyright is the creature of statute, hence the privileges extended and the persons to whom they are available must be determined by the provisions of the Copyright Law.

Although the issue before the Court involves only the construction of Section 23 of the Copyright Law of 1909,

no discussion of the issue would be complete without a consideration of the nature of copyright in general.

Justice Brown, defining copyright in *Holmes* v. *Hurst*, 174 U. S. 82, 86, quoted the famous statement of Lord Mansfield (*Miller* v. *Taylor*, 4 Burrows 2023, at 2396) that it is

> "an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript or any other physical existence whatsoever."

The language of Judge Gardner in *Buck* v. *Swanson*, 33 Fed. Supp. 377, is particularly apt. He said (p. 387) that

> "it is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing."

See also *Fox Film Corp.* v. *Doyal*, 286 U. S. 123.

Copyright is the creature of statute and the privileges appertaining to it, their extent and their limitations, must be found in the law itself.*

"Congress", said this Court in *Caliga* v. *Inter Ocean Newspaper*, 215 U. S. 182, at 188, "did not sanction an existing right; it created a new one."

This doctrine had been settled in *Holmes* v. *Hurst*, 174 U. S. 82, where, after referring to earlier controversies, the Court said (p. 85):

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*Statutory copyright should be distinguished from the common law right which inures to an author prior to the publication of a work. See Copyright Law, Section 2. Section 11 of the Copyright Law permits statutory copyright to be obtained on some works of which copies are not reproduced for sale, but registration under this section likewise displaces the common law right and substitutes statutory copyright in its place. *Universal Film Mfg. Co.* v. *Copperman*, 218 Fed. 577; *Photo Drama Motion Picture Co.* v. *Social U. Film Corp.*, 220 Fed. 448, at 450.

"While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute."

See also:

American Tobacco Company v. *Werckmeister*, 207 U. S. 284;

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339;

Burrow-Giles Lithographing Co. v. *Sarony*, 111 U. S. 53;

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U. S. 1;

Wheaton v. *Peters*, 8 Pet. 591 at 661.

The authority of Congress to enact copyright legislation is derived from Article I, Section 8 of the Constitution, which grants the power

"to promote the progress of science and useful arts by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."

Acting in pursuance of this power, Congress has from time to time enacted copyright legislation. The first statute was adopted in 1790 (1 St. at L. 124). Changes were made from time to time, and a complete revision of the Copyright Law took place in the year 1909 (17 U. S. C., 35 Statutes 1080).

This Court has ruled that these statutes should be liberally construed to accomplish their objects and purposes. In *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, the Court wrote (p. 291):

"Under this grant of authority a series of statutes have been passed, having for their object the protec-

tion of the property which the author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose."

B. The renewal privilege is a new grant available only to the persons specifically designated in the statute.

The Constitution prescribes, and the statutes have provided that the copyright privilege or franchise shall be limited in point of time. Differing from the laws now prevalent in most other countries (Howell, The Copyright Law, 1942, page 100), our statute provides for two separate and distinct, successive terms of copyright. The original design adopted in 1790 (1 Stat. at L. 124) and patterned after the English Statute of Anne (8 Anne c. 19), was changed materially in 1831 (4 Stat. at L. 436, Sec. 2), when the assignee was eliminated from among the persons entitled to apply for the renewal (*White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247, 250.) By the revision of 1909, the pattern of an original term of copyright and a renewal was continued.

The renewal term, it has been held, is not merely a continuation or extension of the original term of copyright. It is a new grant, not stemming from the ownership of the original term, and constitutes a personal privilege available only to those persons specifically designated in the statute, in the order of the prescribed precedence. This doctrine has been stated by the Courts in various ways.

In *White-Smith Music Publishing Co.* v. *Goff*, 187 Fed. 247, the Court said at page 248:

> "It is to be noted that in each statute the grant of the original copyright is to the author or proprietor while, as to the provision for an extension the word 'proprietor' is studiously stricken out."

and again at 249:

> "While the words 'renewed and extended,' in their proper and ordinary construction, relate to a continuing right, yet the fact that, if the author is not living, the 'widow, widower or children' of the author are entitled to the additional term makes the provision of each statute in reference thereto strictly personal, and not really and truly a renewal or extension. Therefore neither statute on its face provides really and truly an extension to the author, his assigns, executors, and administrators, but a new grant to the author or others enumerated as we have said."

The nature of the renewal right is summarized by Justice Hough in *Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909, at 911, cert. denied 262 U. S. 758, in the following language:

> "On this authority, as well as the reason of the matter, we regard it as settled: (1) That the proprietor of an existing copyright as such has no right to a renewal. (2) There is nothing in Paige v. Banks, 13 Wall. 608, 20 L. Ed. 709, opposed to this ruling. (3) The statute confers no right of renewal upon administrators. (4) The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty."

Judge Sibley in *Harris* v. *Coca-Cola Co.*, 73 Fed. (2d) 370, enunciated the principle in the following language, at page 371:

> "The great purpose of a copyright is to secure to authors and artists the financial fruits of their own mental labors. The initial copyright period is frequently assigned to a publisher with but little gain to the author. If the work proves meritorious and successful, the author may have had but little benefit. The second period is intended, not as an incident of

the first for the benefit of the then owner of the expiring copyright, but as a second recognition extended by the law to the author of work that has proven permanently meritorious by giving directly to him, if alive, or, if not, to his widow, children, next of kin or executor (but not to an administrator who may represent no relative and no wish of the author), a supplementary copyright upon the terms stated in the statute."

C. Section 23 of the Copyright Law was designed to enable authors and their families to derive an economic benefit in the twenty-eighth year of the original term, unfettered by prior commitments.

Section 23 of the Copyright Law provides for a basic copyright term of twenty-eight years. Its first clause reads:

> "The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: * * *."

It then makes provision for renewal copyright for an additional term of twenty-eight years. In four categories of literary work, the proprietor under the statute becomes entitled to the renewal. They are (a) works published posthumously; (b) periodical, cyclopedic or other composite works on which copyright was originally secured by the proprietor; (c) works copyrighted by a corporation *otherwise than as assignee* or licensee of the individual author; and (d) works made for hire.

In all other cases,* there is the limitation that only the author, if he be living, or his family, if he be dead, is entitled to the renewal. This portion of Section 23 reads:

> "*And provided further*, That in the case of any other copyrighted work, including a contribution by an indi-

* Bowker (Copyright, Its History and Its Law, p. 114) describes the group of works in which the proprietor may renew as "impersonal" works, and the other as "personal" works.

vidual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication."

It will be observed that there is no provision made here which would entitle an assignee of the author, a proprietor or the author's administrators to the renewal. The exclusion of the assignee from the renewal privilege was not due to inadvertence, but constituted an integral part of the pattern by which Congress sought to preserve for the author and his family the economic benefits which might flow from the survival of a work beyond the original copyright term.

This purpose is explained in the report of the House Committee on Patents which recommended the bill (H. R. Rep. 2222, 60th Congress, 2nd Session). When the Copyright Law was in the course of revision in 1909, a proposal had been advanced that renewals be eliminated and that there be substituted a single term to extend for the life of the author and fifty years. In rejecting the change in the statutory design, the Committee said (p. 14):

"Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens

that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right."

The House Report was adopted by the Senate Committee on Patents as its own (Sen. Rep. No. 1108, 60th Cong. 2nd Session).

Based upon the statutory pattern, it is now settled that an assignee of an author may not in his own right apply for the renewal (1910). *28 Opinions of Attorneys General*, 162; *White-Smith Music Publishing Co.* v. *Goff*, 187 F. (2d) 47. An administrator of a deceased author has no standing to apply for the renewal. *Danks* v. *Gordon*, 272 F. 821, 825. Applications for renewal by the individuals named in the statute may be made only in the order of their precedence. *Silverman* v. *Sunrise Pictures*, 273 F. 909, cert. denied 262 U. S. 758. An executor of a deceased author may apply for the renewal even though the death of a testator takes place prior to the commencement of the 28th year of the original term. *Fox Film Corp.* v. *Knowles*, 261 U. S. 326; *Yardley* v. *Houghton Mifflin Co. Inc.*, 108 F. (2d) 28, 32. An application for renewal by a person not entitled to the privilege is a nullity. *Yardley* v. *Houghton Mifflin Co. Inc.*, 108 F. (2d) 28, 32; *Tobani* v. *Carl Fischer, Inc.*, 98 F. (2d) 57, 60, cert. denied 305 U. S. 650.

Moreover, it was recognized in the Court below that no act on the part of the author, if he fails to survive, can have the effect of defeating the right to the renewal accorded by the statute to his widow and children. Judge Clark, writing for the majority, said (125 F. (2d) 949, at 950, R. 77):

"It is also apparent that the assignment here would not have cut off the rights of renewal extended to the widow, children, executors, or next of kin, in the event of Graff's death prior to the renewal period. See Fox Film Corp. v. Knowles, 261 U. S. 326."

The point of divergence in the Court below was the extent to which the statute provided a safeguard to the author against his own improvident act.

The majority reached the conclusion that notwithstanding the limitations written into the statute, and despite the language of the Patent Committees' reports, the intent to make the renewal inalienable by anticipatory assignment had not been expressed with sufficient clarity to effect that purpose. Stress was laid upon the absence of language specifically providing that the attempted assignment would be "void and of no effect" (125 F. (2d) 951; R. 77).

The Committee's report and its expression of intent will be referred to later. At this juncture, we submit that undue weight was given to the absence of prohibitory language in the statute. If, as we urge, it was the purpose of Congress to reserve to the author a renewal right which would be inalienable in advance of its accrual, the limitation written into the Act restricting the privilege to the author if living, is sufficient to accomplish that purpose.

The precision with which Section 23 enumerates the persons to whom the new franchise is available, is in itself equivalent to an express prohibition. The requirement that application be made by the author should be contrasted with the earlier portion of Section 23 which entitles a "proprietor" to renew in his own right when the work comes within the excepted categories. When the statute enables a corporate proprietor to renew the

copyright on impersonal works originally copyrighted by it, the terms specifically exclude from that privilege those works which the corporation copyrighted "as assignee or licensee of the individual author".* No distinction is made between an assignor who survives and one who fails to survive the crucial year.

One should also contrast the explicit language of Section 23 with the more general wording of other sections of the Copyright Law.

Section 9 provides:

> "That *any person* entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act."

Section 10 reads:

> "That *such person* may obtain the registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, * * *"

Section 8 provides:

> "That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for

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* The language of the statute is: "That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright * * *" (Copyright Law, Section 23, 17 U. S. C. A., 35 Stat. 1080.)

such work *under the conditions and for the terms* specified in this Act: * * *." *

It appears to have been a matter of complete indifference to Congress whether copyright for the first term was secured and registered by the author, by the assignee, or by the publisher-proprietor. That might be a matter of private dealings and contractual relation between the parties. In creating the renewal, however, Congress undertook to designate by name the individuals to whom this new franchise was available in the twenty-eighth year, thereby excluding from the benefits of the statute persons who were not intended to have access to the privilege.

On the proposition that the renewal application must be filed by the author, we anticipate no dispute. The reasoning is advanced, however, that although the application must be filed *by or in the name of the author*, it is not necessary that he be the beneficial owner of the privilege at the time. This reasoning is predicated upon a literal reading of the statute, and presupposes that Congress was completely indifferent to the practical consequences of preserving the renewal pattern. The limitation in the statute is thus relegated to an administrative pro-

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* This provision manifestly does not authorize an anticipatory assignment of the renewal. It refers to the author *or* the proprietor in the alternative and speaks of the "terms" of the copyright, and the "conditions" prescribed by the Act. Obviously, the reference is to the respective terms and would include the limitations of the renewal section. Additional indications that Section 8 does not vary or enlarge the terms of Section 23, appears on the one hand from the inclusion in Section 8 of the "administrator", who has no interest in the renewal, and on the other the omission of the widow, children and next of kin who are specifically provided for in Section 23.

After an author has perfected his renewal as the beneficial owner of the right in the 28th year, he may then do with it as he pleases. This seems clear from the language of Section 42, which reads:

"Assignments and bequests. Copyright *secured* under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will." (17 U. S. C. A., 35 Stat. 1084.) (Italics ours.)

vision or a mechanical means by which the term of copyright may be extended.

Adherence to this literal interpretation is, we submit, inconsistent with the doctrine that the courts will effectuate the policy of a statute and will refuse to enforce contracts in contravention thereof even though the statute itself contains no express prohibitions.

> *Restatement of the Law of Contracts*, Sections 512, 580, 2(e), Illustration of Clause (e).

In this respect, the present case comes within the rationale of *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, which concerned the validity of an agreement by a national bank to repurchase securities previously sold to a customer. The Act provided

> "that the business of buying and selling investment securities was hereafter to be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person * * * or corporation in the form of bonds, notes, and/or debentures, commonly known as investment securities."

The contract was there held invalid as coming "within the broad sweep of the statute which by mandatory language sets up the definite limits upon the liability which may be incurred by a national bank * * *" (p. 214).

This court in *National Licorice Co.* v. *Labor Board*, 309 U. S. 350 held that a contract by which employees agreed "not to demand a closed union shop or a signed agreement by his employer with any union" constituted a violation of the National Labor Relations Act. It said that the restriction was in plain conflict with the public policy of the Act to encourage the procedure of collective bargaining. See also *National Labor Relations Board B. D.* v. *Reed Prince Mfg. Co.*, 118 F. 2d 874; cert. denied 313 U. S. 595.

In *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316 U. S. 572, decided by this Court June 8th, 1942, Judge Reed said (p. 579):

> "Neither the wage, the hour, nor the overtime provisions of Sections 6 and 7 on their passage spoke specifically of any other method of paying wages except by hourly rate. But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the Act."

The New York Court of Appeals, in holding unenforcible an agreement by which a debtor had waived and relinquished his statutory right of exemption of property from execution, imposed the prohibition despite the absence of express language in the statute invalidating such agreements. *Kneettle* v. *Newcomb*, 22 N. Y. 249. It was said (pp. 251-252):

> "By the statutes exempting certain property, the legislature in effect determined that it was inexpedient to allow contracts entailing such results; and this was done by providing that certain property, of limited value, should not be taken. Parties cannot now stipulate that their contracts shall have the same effect as under the former law, for that would be hostile to the policy thus established."

In *Andrews* v. *Security National Bank* (1932), 121 Tex. 409, the Court said (pp. 417-418):

> "In view of their objects and purposes, and the rule of construction stated, it is obvious we should so interpret and apply our homestead laws so that their original intendments to benefit both the citizen and the State may be effectuated. It is equally clear that in doing so we ought not to permit evasive contracts to thwart the purposes of the organic law, even though the creators of the contract may have conceived that they had found a twilight zone between the abandonment of one homestead and the acquirement of another, in which they might create a lien on the homestead other than for purchase money or im-

> provements, and thus effectually do the very thing which the Constitution, and statutes which follow it, intended to prohibit."

See also:

> *Bunker* v. *Coons* (Utah), 60 Pac. 549;
> *Meyer Bros. Drug Co.* v. *Bybee* (Mo.), 78 S. W. 579;
> *Green* v. *Watson*, 75 Ga. 471;
> *Mills* v. *Bennett* (Tenn.), 30 S. W. 748.

The rule was succinctly stated by this Court in a case involving the construction of the Copyright Law itself. In *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, Justice Day wrote (p. 293):

> "But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.
>
> "It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But while seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained."

The problem, therefore, resolves itself into one of determining the policy of the statute. We believe that the solution of that question lies in the answer to the following questions: When Congress rejected the proposal that there be but one term of copyright, and retained the renewal design, hedging it about with a limitation that the privilege could be exercised by the author alone, did it intend that he should have the substance of the renewal privilege when he filed his application? Is the legislative purpose satisfied if the author is merely a straw man

filing the application in the interest of a publisher, who is excluded by the statute from the privilege of applying in his own right?

The Patent Committee's explanation of its reasons for rejecting a single term assignable in its entirety to a publisher, would seem to be conclusive as to the result sought to be accomplished. Regarding the Congressional Report, however, the majority said:

> "We are perfectly willing to uphold a Congressional declaration that public policy forbids assignment of a copyright renewal; but we expect something more than ambiguous inferences drawn from a committee report explicitly arguing only for continuance of an existing statutory scheme with a new renewal period" (125 Fed. (2d) 949, 954, R. 84).

Judge Frank, dissenting, reasoned:

> "The Committees almost literally described the facts of the instant case: Graff sold outright his original term for a small sum. His turned out to be one 'of the comparatively few cases where the work survives the original term.' It was to meet just such a contingency, the Committees said, that Congress gave 'the author the exclusive right' to 'an adequate renewal term' so that he could, in such a case, 'reap the reward' in 'his old age.' We should see to it, that, as Congress intended, the 'right of the author to take the renewal term' is so hedged about that he can *'not be deprived of that right'* by having it *'taken away from him in his old age when he needs it the most.'*
>
> "I find it difficult to regard those expressions of the Committees as mere idle talk, or as so ambiguous that we can laugh them off * * *" (125 Fed. (2d) 949, 958, R. 93). (Italics quoted from the record.)

With all deference to the majority in the Court below, we urge that the Committee's report has been read much too narrowly.

The Committee

> "decided that it was distinctly to the advantage of the author to preserve the renewal period."

Had its report ended here, one might well agree with the Court below that the purpose of retaining the statutory scheme was to provide a convenient device by which an author might sell all of his statutory privileges or by which he might part only with the first portion and retain the balance if he chose.

However, the Committee crystalized its purpose by giving an example of the kind of transaction it desired to forestall. It said:

> "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum."

Manifestly, the sole objection to an outright sale is that the author would derive no financial reward if his work proved sufficiently successful to live beyond a twenty-eight-year period. All of the gains from the second term of twenty-eight years would inure to the publisher. This objectionable result would not be remedied by creating a renewal term alienable prior to the end of the first term. Consequently, the Committee argued:

> "If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the *exclusive* right of the author to take the renewal term * * *." (Italics ours.)

It is of no small moment in this case that the Committee referred specifically to the author, and not to a deceased author who might leave surviving a widow or children. It rebuts the suggestion that the renewal was retained to safeguard only the widow and children against an improvident disposition.

Finally, the Committee said that

> "the law should be framed as is the existing law, so that he could not be deprived of that right.

Judge Clark thought this statement was ambiguous. He said (R. 79-80):

> "Does this mean he could not be deprived of it if he 'sells his copyright outright to a publisher'? If so, we agree. Or did they mean that a court was to strike down the author's attempt specifically to dispose of his expectancy? If so, 'deprive' was a poor word to use, for the result is that he is 'deprived' of his privilege to alienate his renewal right, not saved from 'deprivation' of the right itself."*

The fallacy in this reasoning is that the Committee's sole concern lay in the possibility that the author might be deprived of the financial benefits resulting from the renewal. It was not concerned by the fact that he would be "deprived" of the right to alienate it in advance. Its reason for limiting the validity of the privilege and making it personal was to prevent the renewal from passing out of the author's control. Bowker says (Copyright, Its History and Its Law, p. 117):

> "In the copyright conferences, it was pointed out by publishers that the right of the author to renewal, and the *implied denial* of that right to an assignee proprietor, placed at serious disadvantage a publisher who had made investment in plates of an author's works, and would be deprived of the use of his investment at the end of the original term in case the author prefer-

* This expression of the Court may well be compared with an argument made by Drone in 1878. Drone urged that the author could dispose not only of his own renewal privilege, but also the privilege which would extend to his widow and children if he failed to survive. He said (Drone on Copyright, p. 327):

> "The provision under consideration was, doubtless, intended to secure to the author and his family a privilege which is not given directly to an assignee; but *it is not reasonable to suppose* that the object of the statute was to reserve to the author or his family any rights with which he has voluntarily parted, and for which he has received and enjoyed the consideration." (Italics ours.)

Drone's view has not been accepted by Congress or by the courts.

red to make arrangements with another publisher for the renewal term. The Congressional Committee failed, however, to provide a remedy for this through the proposed Monroe-Smith amendment, requiring that in such case author and publisher should unite in the application for renewal."

When the Committee wrote that "it should be the *exclusive* right of the author to take the renewal term", it obviously had in mind something more than the mere power of an author to withhold from a purchaser some interest in the copyright. Had the renewal been treated merely as an expectancy, subject to conveyance or retention as the author chose, there would be no purpose in the reference to the "exclusive right" of the author to take the renewal term, or the possibility that he might be deprived of it. Concession must be made to the Congressional knowledge that an assignee could acquire the renewal only if the author chose to convey it and would have no interest in the renewal if the author elected to retain it. The use of the expression "deprive" can refer logically only to a relinquishment by the author's act, occasioned by his own improvidence.

The Committee was not dealing in a vacuum. It was interested in the practical consequences of retaining the pattern of a renewal copyright. It sought to forestall disposition by the author of his entire interest in the copyrighted work until time had established its worth. It is difficult to see how this purpose is achieved by construing the statute to permit the author to include in the sale, for the same pittance, the renewal as well as the original term. The renewal privilege was accordingly limited so that the author, despite himself, might have the "exclusive right" and therefore a new opportunity to bargain for the exploitation of his work at the end of twenty-eight years and to derive whatever financial benefit might accrue from the fact that his property was sufficiently meritorious to have a monetary value after that length of time.

The suggestion that authors and their widows ought not to be deprived of the opportunity to realize money by anticipating upon the renewal, and that forced savings should not be imposed upon them (R. 83), not only disregards the language of Congress, but contemplates a highly illusory benefit. Congress certainly did not intend to increase the hazards of improvident sales by authors and their families. Yet, that is the very consequence which results from the interpretation given to the statute. Were the renewal wholly alienable, an author or his widow might sell it for an amount commensurate with its value as literary property. Under the statute, there is no way in which an author or his family can convey a full, complete and marketable title prior to the twenty-eighth year. All that he can sell is the expectancy based upon his survival. No purchaser could logically be expected to pay full value for property which he may never receive. The purchase price must be diluted by the contingency that the seller might not survive to file the application and deliver the renewal. If the author's wife be joined in the conveyance, the title is still not complete. She may fail to survive and the right will pass to the children free of the claims of the purchaser. Efforts to join the children in the sale present troublesome questions of infancy and of the possibility of the birth of additional children. Consequently, the shield erected to protect the necessitous author becomes a weapon to diminish or completely destroy his bargaining power. This result is hardly a sensible one, and to borrow the language of Justice Stone in *U. S.* v. *Katz*, 271 U. S. 354, at 357:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

The Court below expressed the opinion, however, that "some weight may be attached to the fact that an ambigu-

ous statutory provision has fairly uniformly been interpreted one way, and presumably acted upon" (R. 81). The interpretations referred to are statements of text writers who for the most part expressed doubts on this "vexed question of rights for the renewal term" (See Bowker, Copyright, Its History and Its Law, 1912, p. 118). After 1909, many of them admittedly tended to "hedge".

Any purchasers of renewals knew that they were buying nothing but a speculative interest. They knew at least that if the author failed to survive, their purchases would be worthless. One need not look beyond the present case. Chauncey Olcott, one of the co-authors with Graff, died before the renewal date (R. 18). He had made an agreement conveying his interest in the renewal to the respondent (R. 4; Exh. 1 annexed to affidavit of Herman Starr, R. 8-9). Nevertheless, the respondent, in order to acquire that interest, was obliged to purchase Mrs. Olcott's share in the renewal (R. 5; Exh. G, R. 34-35).

To say that the respondent in the instant case actually purchased the renewal from Graff as part of an independent transaction, loses sight of reality. When in 1917, respondent paid an amount at the rate of $23 per song, it was buying a release of the royalties which might still accrue under the agreement with Graff made in 1910.* The

* The practice of adding renewals for good measure in contracts conveying the original term or releasing royalties does not seem to be unusual. In *Schumer, Inc. v. Robbins Music Corp.*, 176 Misc. (N. Y.) 578, the plaintiff claimed the renewal under a contract made in 1912 by which the author originally transferred the musical compositions to the publisher. In *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 Fed. Supp. 859, the defendant Harris claimed priority to Joseph E. Howard's interest in the renewal to "I Wonder Who's Kissing Her Now" under an agreement by which for a consideration of $150.00 Howard had released his royalties and had assigned all his right, title and interest by way of copyright or otherwise (42 Fed. Supp. 862, col. 2, also 865, col. 2). The same case concerned a second song—"The Bird on Nellie's Hat." It appears that this song was sold to plaintiff's predecessor on or about June 26, 1906. One of the authors, Lamb, had released his royalties and conveyed his renewals in January 1907 (p. 866, col. 2). Solman, the co-author, in December 1913, had assigned to the plaintiff's predecessor "all royalties accruing" on a long list of songs "and all renewals and extensions thereof" (p. 866, col. 2). (These cases were decided after the present decision.)

assignment of the renewal was merely an appendage to the agreement, since if renewals could be purchased in advance of their perfection, respondent might have claimed them under the terms of the earlier agreement, to which they were likewise an appendage. We do not argue that the price was inadquate. What we say is that there is no criterion by which adequacy of price can be judged at a time when the sufficiency of the conveyance is dependent upon the seller's survival.

An example of the insecurity of a purchaser's claim to the renewal appears in *Selwyn & Co. Inc.* v. *Veiller*, 43 F. Supp. 491. Bayard Veiller had in 1914 sold to Selwyn & Co. Inc., play brokers, the play entitled "WITHIN THE LAW" and had conveyed the copyright and any renewals or extensions, giving to the purchaser authority to apply for and receive these renewals. Selwyn & Co., in turn, assigned the motion picture rights in the play to a motion picture company (in 1917 for the original term, and in 1922 for the renewal period). By mesne conveyances, these rights found their way into the hands of Loew's, Inc.

The renewal copyright was effected by Veiller on January 27, 1939. Two days before that, he had entered into an agreement with Loew's under which he received $5,000 in return for an assignment by himself, his wife and his only son.

In the interim, Selwyn & Co. had been dissolved for failure to pay New York State corporate taxes. Its existence was revived and suit was instituted by Selwyn against Veiller to recover the money paid and to compel an assignment of the renewed copyright. The District Court held that although Veiller was not obligated to pay over the $5,000, he was required on the authority of the instant case to assign his renewal copyright.

Apparently, as Judge Rifkind pointed out (43 F. Supp. 491, at 493), there was enough doubt concerning the

validity of anticipatory assignment to induce the motion picture company to pay a substantial amount of money on the eve of the renewal application in order to purchase the author's rights. Whether the motion picture company would have paid the same amount of money on the hazard that Veiller might die in the two days which elapsed between the agreement and the filing of the renewal application is highly conjectural.

Nor should it be assumed that the purchaser of the renewal rights will be much better off as a result of the decision in the present case. He will still be subject to the hazard that the author may not survive the crucial year and that a purchase must be made from the widow and children.

Construed, as it has been in the Court below, the limitations in the statute are at most administrative formalities providing no safeguard to the author, or security to the publisher, which may be circumvented by the insertion of a few words in a contract.

If, on the other hand, the statute be construed to prohibit anticipatory assignments, the limitations which it provides and the announced purpose of Congress become consistent. In the twenty-eighth year, the author, if he be alive, or his widow or children, if he be dead, can convey a full marketable title to the property. The purchaser will be assured of the benefits of his bargain, and the price to the seller will not be diluted by the hazards of non-survival.

True, by this construction, the author is deprived of a right to sell his renewal before the twenty-eighth year arrives. By the same token, individuals are deprived of the right to pay usurious rates of interest, or to waive homestead and other statutory exemptions in order to borrow money. A beneficiary of a trust is often deprived of his

right to assign his income in advance (*Stringer* v. *Young*, 191 N. Y. 157). Employees are deprived of their right to work for less than minimum wages or to work overtime without extra compensation. These examples might be multiplied infinitely and the considerations in all the instances are of like character. The law often limits the individual's freedom of action in the interests of a broader public policy to be served. If, as must be conceded in the instant case, Congress has the power to impose the limitation, the wisdom or folly of the restriction is a matter only of legislative concern.

To quote Justice Holmes in *Dillingham* v. *McLaughlin*, 264 U. S. 370, at 374:

> "* * * Whatever may be one's own opinion about the wisdom of trying to save the ignorant and rash from folly, it is a recognized power that is used in many ways."

POINT II

The history of copyright legislation in the United States fortifies the view that the renewal privilege may not be alienated by an anticipatory assignment or agreement to assign.

In the first point of this brief our argument was addressed to the limitation contained in Section 23 of the Copyright Law of 1909 and its construction based on its structure and likewise against the background of the Patents Committee Report. The Committee in its report refers to the proposed Bill as re-enacting the existing law, which did not, we submit, by the statutory provisions after 1831, permit anticipatory alienation of the renewal copyright.

An examination of the history of copyright legislation in the United States reveals that under the first federal

copyright statute enacted in 1790, an assignee, by express provision, not only could acquire the author's interest in the renewal, but was entitled to perfect that renewal in his own right. The statute (1 Stat. at L. 124) provided that:

> "* * * if, at the expiration of the said term, the author or authors, * * *, be living * * * the same exclusive right shall be continued to him or them, his or their executors, administrators *or assigns*, for the further term of fourteen years: Provided, *he or they* shall cause the title thereof to be a second time recorded and published * * * within six months before the expiration of the first term of fourteen years aforesaid." (Italics ours.)

When, however, the Act was amended in 1831, reference to the assignee was eliminated and the right limited to the author and his family (4 Stat. at L. 436, Sec. 2):

> "That if, at the expiration of the aforesaid term of years, such author, * * * be still living, and a citizen * * * of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to *such author;* * * * or, if dead, *then to such widow and child, or children,* for the further term of fourteen years." (Italics ours.)

Concerning this change in the wording of the statute, Judge Putnam, writing for the Court in *White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247, said (p. 250):

> "Here, then, was an entirely new policy, completely dissevering the title, breaking up the continuance in a proper sense of the word, whatever terms might be used, and vesting an absolutely new title *eo nomine* in the persons designated."

The copyright statutes of 1870 (16 Stat. at L. 212, 213) and 1891 (26 Stat. at L. 1107) continued the policy of the

Act of 1831 in its departure from the law of 1790. Section 88 of the Act of 1870 makes it clear that the application for renewal must be filed in the name of the author, his widow or his children, and that the obligation rests upon them to publish notices thereof. It provides:

> "* * * that the author * * * if he be still living * * * or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work * * *. And *such person* shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers * * *." (Italics ours.)

The amendment of 1891 (26 Stat. at L. 1107) contains the same provision, but eliminates a requirement that the author be a citizen or resident of the United States.

Had there been any doubt concerning the purpose of the prior statutes, this must be considered dissipated by the action of Congress in 1909.

The 1909 revision of the Copyright Law was the result of labors which had commenced some three or four years prior to that time. The need for a complete revision was stated in President Roosevelt's message to Congress in December, 1905. The Copyright Office had, following extended conferences with groups interested in Copyright, prepared a Bill for submission to Congress (Report of House Committee on Patents No. 2222, 60th Cong., 2d Session, pp. 1-4). This Bill (H. R. 19853 and Senate Bill 6330, 59th Cong., 1st Sess.) had proposed a single term

of copyright to extend during the lifetime of the author and for a period of fifty years thereafter.*

Public hearings were held jointly by the House and Senate Committees on Patents, and ultimately, in 1907, proposed Copyright laws were reported to the respective Branches of the 59th Congress (House Report 7083 on H. R. 25133, January 30, 1907, 59th Cong., 2d Sess., Senate Report 6187 and S-8190, February 5, 1907, 59th Cong., 2d Sess.). No action was taken on these Bills (Report of House Committee on Patents No. 2222, 60th Cong., 2d Sess., p. 4).

These Reports and the legislation proposed are, however, important as a step in the development of the Statute now before the Court.

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* The Bill proposed by the Copyright Office eliminated the principle of renewals and provided for single terms of copyright. Section 18 of Senate Bill 6330 and H. R. 19853 read as follows (59th Cong., 1st Sess., May 31, 1906):

"Sec. 18. That the copyright secured by this Act shall endure—(a) For twenty-eight years after the date of first publication in the case of any print or label relating to articles of manufacture: *Provided*, That the copyright which at the time of the passing of this Act may be subsisting in any article named in this section shall endure for the balance of the term of copyright fixed by the laws then in force.

(b) For fifty years after the date of first publication in the case of any composite or collective work; any work copyrighted by a corporate body or by the employer of the author or authors; any abridgment, compilation, dramatization, or translation; any posthumous work; any arrangement or reproduction in some new form of a musical composition; any photograph; any reproduction of a work of art; any print or pictorial illustration; the copyrightable contents of any newspaper or other periodical; and the additions or annotations to works previously published.

(c) *For the lifetime of the author and for fifty years after his death in the case of his original book, lecture, dramatic or musical composition, map, work of art, drawing or plastic work of a scientific or technical character, or other original work, but not including any work specified in subsections (a) or (b) hereof; and in the case of joint authors, during their joint lives and for fifty years after the death of the last survivor of them.*

In all of the above cases the term shall extend to the end of the calendar year of expiration.

The copyright in a work published anonymously or under an assumed name shall subsist for the same period as if the work had been produced bearing the author's true name." (Italics ours.)

The proposal in 1907 was that there be a single term of copyright to continue during the lifetime of the author and for a period of thirty years after his death. It was coupled with a proviso that the term would end twenty-eight years from first publication of the work unless the copyright *proprietor* in the twenty-eighth year recorded a notice that he desired the protection for the full term (Senate Report 6187, 59th Cong., 2d Sess., February 5, 1907, p. 7, H. R. Rep. 7083, 59th Cong., 2d Sess., pp. 13-14).*

Relative to the single term of copyright and the abandonment of the renewal design, the House Committee said (H. R. 7083, 59th Cong., 2d Sess., p. 13):

> "Your committee believe that it is better to have a single term without any right of renewal * * *."

The Senate Committee, after referring to the proviso which required the *proprietor* to record the notice necessary to keep the copyright alive, said (Senate Report 6187, 59th Cong., 2d Sess., p. 7):

> "This amounts to an initial term of twenty-eight years (identical with the present initial term), with the privilege of a renewal."

* Section 17 of S-8190 (59th Cong., 2d Sess.), which is annexed to Senate Report 6187, page 18, reads in part as follows:

"That the copyright secured by this act shall endure:

(Subdivisions (a) and (b) refer to photographs and posthumous works, the terms of which are twenty-eight and thirty years, respectively.)

(c) In the case of any work not specified in subsections (a) and (b) of this section, for the remainder of the lifetime of the author after such first publication under this Act and for thirty years after his death: *Provided*, That within the year next preceding the expiration of twenty-eight years from the first publication of such work the copyright proprietor shall record in the Copyright Office a notice that he desires the full term provided herein; and in default of such notice the copyright protection in such work shall determine at the expiration of twenty-eight years from first publication. But in the case of renewals and extensions of existing copyrights sought under the provisions of section eighteen of this act such notice may be given within the year next preceeding the expiration of the existing term."

The corresponding provision in H. R. 25133 (59th Cong. 2d Sess.) is Section 18 thereof.

It made an interesting observation concerning the duration of the term, saying (p. 8):

> "That the duration of the term is a question not so much between the author and the reading public (who get his book at the outset and do not get it any more completely after than during the term) as between the author with his one publisher who pays him something for his work and the other publishers who may wish to publish it without paying him anything."

It needs no argument to demonstrate that if this provision had become law, there could be no controversy over the "renewal". In the first place, there would have been only a single term which could have been assigned in its entirety by an author. Secondly, even were the continuation beyond the twenty-eighth year to have some of the elements of renewal, as we now know it, the statute made the privilege available only to the *proprietor* and provided the machinery by which he might perfect his right. The length of the term so provided for was said to be for the protection of the author in his old age, but whether he or his assignee benefited from the continued success of the work would depend solely on the author's bargaining power when he first brought the work to the publisher for publication.

In February, 1909, the Bill, which ripened into the Copyright Law of 1909, was reported to the 60th Congress, 2d Session. No longer did the Committees believe that it was better to have a single term and to abandon the renewal pattern. Indeed, there was a complete reversal of position on that subject. As shown earlier in this brief, the Committees in 1909

> "decided that it was distinctly to the advantage of the author to preserve the renewal period."

Consequently, we have a statute which gives to the proprietor, to the exclusion of the author and his family,

the renewal privilege only in certain categories of works. In these categories, machinery is provided by which the proprietor may perfect these renewals in his own right. Concerning all other works—personal works of the author—the new franchise is available only to the author or his family.*

It is difficult to explain the 1831 change in the pattern of the Copyright Law and the elimination of the assignee from the category of persons entitled to take the renewal unless it be integrated with a public policy to prevent an anticipatory alienation by the author. Unless that policy be recognized, it is equally difficult to explain the rejection of the single term design and the continuance of the renewal pattern in 1909. The suggestion that this change may have come about only to prevent the author from disposing of the right extended to his widow and his children, if he himself failed to survive, does not account for various factors of the statute. There is, for instance, no machinery provided by which an assignee of an author may perfect his right to the renewal by filing an application in his own name, if the author be living. Under the Statute of 1790, an assignment of the renewal was permitted and the assignee was given the privilege of recording it in his own name. After 1831, however, the assignee was denied that privilege, and the statute accord-

* Judge Clark laid stress upon Bills introduced into Congress after 1909 but which never became law (R. 82). To him, it appeared that these Bills supported a belief that the renewals were subject to anticipatory assignment. It is difficult to follow the argument that an unsuccessful attempt to change the law provides any evidence of an earlier intent. Another difficulty of arguing on the basis of proposed statutes is indicated by the reference to the so-called Vestal Bill (H. R. 12549, 71st Cong., 2d Session, House Report 1689). This Bill would have created a term continuing during the life of the author and for fifty years thereafter, with a provision that during the last twenty-two years of the term there was to be a reversion to the author's family (H. R. Rep. 1689, p. 10). The Report of the Committee shows (p. 3 that the entire structure of the Copyright Law was to be changed. Provision was made for "automatic" copyright, with the result that protection would be had from the moment when a work was created and before there was any publication. The copyright was to be divisible so that an assignment could be made of specific rights without conveying the entire copyright (see H. R. Rep. 1689, p. 5). These elements would have so changed the picture that there is no proper basis for comparison.

ingly provided no machinery by which an application for renewal may be filed by him. In 1909, Congress segregated the category of impersonal works and provided the machinery by which the proprietor, to the exclusion of the author or his family, might file the renewal application. In respect of personal works, the proprietor in turn was excluded. It seems strange that Congress should have varied this machinery unless it intended to preserve to the author the "exclusive right" to both the legal and the beneficial ownership of the renewal until it had been perfected.

In conclusion on this point; we respectfully urge that the majority in the Court below misconceived the purpose which led to the change in the renewal structure in 1831 and which has continued to the present day. The careful distinction made by Congress between those categories of works in which the proprietor is entitled to the renewal, and those in which the author has the exclusive right, the limitations upon the right to apply for the renewal, the explanation of its purpose by the Congressional Committee, all present a uniform design. They point to the intention to create the renewal as a privilege personal to the author, to which he has the "exclusive right" in the twenty-eighth year, and one which by the policy enacted in the statute, he may not dissipate. The renewal is inalienable not because it is an expectancy, but because Congress chose to treat the author as though he were the beneficiary of a spendthrift trust.

POINT III

The policy of the statute to limit the renewal privilege to the author and his family nullifies any agreement by which a third person seeks to acquire in advance of the twenty-eighth year the benefits intended to be reserved to the author and his family alone.

The opinion below states (R. 83):

> "* * * It should require more than an ambiguous committee report on an ambiguous statutory provision to produce such a drastic restriction on free assignability.
>
> This conclusion is reinforced by the history of judicial disapproval of restraints on assignability. Thus lawyers discovered a way around the archaic rule against assignment of cases in action, courts of equity supported them directly, and courts of law winked at the result.* * *"

We respectfully submit that considerations of alienability of property and the rules which lead to the recognition of assignments of expectancies or choses in action, are not properly applicable to the case at bar.

A. The limitation by which only the author may apply for the renewal is not a mere technicality or functional impediment which may be overcome by legal devices. It is an obstacle imposed by the statute to safeguard the author against his improvident act.

If it be concluded that no policy was established by the statute to prevent alienation of the renewal by the author prior to the effective year, the same ultimate result follows whether the conveyance is construed as an assignment or an agreement to assign, or is or is not implemented by a power of attorney.

In *Rossiter* v. *Vogel*, 46 Fed. Supp. 749, 750, Judge Coxe, on the authority of the present case, sustained an anticipatory assignment in the absence of the "traditional power of attorney to enforce its terms."

In *Edward B. Marks Music Corp.* v. *Jerry Vogel*, 42 Fed. Supp. 859, Judge Leibell stated concerning an agreement which did not specifically mention the renewal copyright (p. 865):

> "The defendant Harris argues that Howard's assignment of December 2nd, 1916 to Charles K. Harris included any rights of Howard to a renewal copyright, although not specifically mentioned. By the instrument Howard purported to 'grant and convey' to Harris all Howard's right, title and interest 'by way of copyright or otherwise' in and to all of Howard's musical compositions published by Harris. The language of grant of what Howard "sold" to Harris is very comprehensive. It may be that Howard thereby parted absolutely with his entire interest in the work. Tobani v. Carl Fischer, Inc., 2 Cir., 98 F. 2d 57, 60. * * *"

Consequently, we must revert to the primary question, which is the policy announced by the statute, and not the form which a particular transaction may take. If this Court should agree with us that Congress intended that the true applicant for the renewal be the author and not a publisher masquerading in the person of the author, then no device, however ingenious, may defeat that purpose.

Justice Holmes, writing for this Court in *Bullen* v. *Wisconsin*, 240 U. S. 625, said at p. 630:

> "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

The form which a transaction takes cannot override its true meaning.

Superior Oil Co. v. *Mississippi*, 280 U. S. 390;
United States v. *San Francisco*, 310 U. S. 16.

It is our contention that any attempt, whether it be by way of assignment, agreement to assign, or "conveyance of the work", and whether it be coupled with a power of attorney, is equally on the wrong side of the line drawn by the Legislature in the instant statute. The necessity for resorting to indirection because the statute prevents an assignee from perfecting the renewal in his own right, is an indication of the Congressional intent that he should not have it.

Any other rule increases the confusion in respect of renewals. If, for example, the agreement made by Graff is valid, then that provision by which he undertook (R. 31-32) on behalf of his executors and administrators to "procure the due execution * * * and delivery to the publisher * * * of all papers necessary to secure to it the renewal * * *" would likewise be valid. In default of the delivery of the assignment by the widow or children, Graff's estate could be required to respond in damages. By this circuitous method, therefore, Graff's widow and children would suffer through the diminution of his estate, even if he had died prior to the accrual of the renewal term, because of their refusal to part with they retain what the statute gave them as a new grant.

We have no doubt that this provision would be stricken down, not because it lacks the elements of an agreement, but because of the statutory policy which forbids it in this case. Agreements may sometimes be freely made, expectancies as such may now be assigned; but not when the law forbids the result sought to be accomplished.

Awotin v. *Atlas Exchange Bank*, 295 U. S. 209;
295 U. S. 209;

Kneettle v. *Newcomb*, 22 N. Y. 249;
National Licorice Co. v. *Labor Board*, 309 U. S. 350;
Overnight Motor Transportation Co., Inc. v. *Missel*, 316 U. S. 572.

Judge Cardozo, in *Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324 wrote, 341:

> "In the last analysis, the case for the petitioner amounts to little more than this, that the effect of the Resolution in its application to these leases is to make the value of the dollars fluctuate with variations in the weight and fineness of the monetary standard, and thus defeat the expectation of the parties that the standard would be constant and the value relatively stable. Such, indeed, is the effect, and the covenant of the parties is to that extent abortive. But the disappointment of expectations and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. 'Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity.' Norman v. Baltimore & Ohio R. Co., Supra, pages 307, 308. To that congenital infirmity this covenant succumbs."

Courts have in many instances given recognition to restraints and limitations imposed by law and which could not be disregarded directly or by indirection.

Recently, it was held by the New York Court of Appeals that a contract between an employer and its salesmen which attempted to fix their status as independent contractors, could not prevail against their true status as employees under the Unemployment Insurance Law of the State.

Electrolux Company v. *Miller*, 288 N. Y. 440.

A purchaser of securities was held entitled to recover the price paid because the seller's salesman was not

licensed under the state law. *Dougherty* v. *Bartlett*, 81 F. 2d 920.

In *Copeland* v. *Melrose National Bank*, 229 A. D. 311, aff'd 254 N. Y. 632, a national bank employed the plaintiff as a vice-president for a period of 3 years. Since under the Federal statute an officer is subject to dismissal at pleasure, the contract read that if it were terminated prior to the date of expiration, the plaintiff would receive as liquidated damage a sum equal to the total compensation for the unexpired period. This was stricken down, the Court saying (p. 313):

> "To uphold the liquidated damage provision of the contract would be to countenance a patent subterfuge designed to circumvent the law. It is idle to say that the statute merely gives the power to discharge the official, without the right to do so."

An agreement to waive the statutory homestead exemption has likewise been held invalid as against public policy.

Bunker v. *Coons* (Utah), 60 Pac. 549.

See also:

Meyer Bros. Drug Co. v. *Bybee* (Mo.), 78 S. W. 579.

In *Traders' Inv. Co.* v. *Macon Ry. & Light Co.* (Ga.), 59 S. E. 454, the Court refused to enforce a provision in a contract by which a laborer had waived the statutory exemption of his wages from garnishment.

See also:

Green v. *Watson*, 75 Ga. 473;
Mills v. *Bennett* (Tenn.), 30 S. W. 748.

An agreement by a debtor, in advance of the filing of a bankruptcy petition, to waive the defense of the Bankruptcy Act has been held unenforceable.

Federal National Bank v. *Koppel*, 253 Mass. 157.

The interest of a beneficiary in the income of a trust may not be assigned.

Stringer v. *Young*, 191 N. Y. 157.

A receiver may not assign his fees until after they are earned.

Fischer v. *Liberty Bank*, 53 Fed. (2d) 856.

An executor may not dispose of his fees in advance of their accrual.

In re Worthington, 141 N. Y. 9.

Public officers may not assign their salaries.

Bliss v. *Lawrence*, 58 N. Y. 442;
Bowery National Bank v. *Wilson*, 122 N. Y. 478;
Diehl, C. E., Inc. v. *Sheehan*, 233 App. Div. 258, affirmed 258 N. Y. 624.

A right of entry for breach of a condition subsequent is not assignable.

People v. *Wainwright*, 237 N. Y. 407.

One may not assign the right to file a mechanic's lien.

Tisdale Lumber Co. v. *Read Realty Co.*, 154 A. D. 270, where the court said:

> "The right to file a mechanic's lien is a personal right limited to the person performing the labor or furnishing the material and is not assignable."

In *Rochester Ry. Co.* v. *Rochester*, 205 U. S. 236, the Court held that a railroad could not transfer its right to enjoy immunity from assessment on a franchise.

In *Romaine* v. *Chauncey, et al.*, 129 N. Y. 566, the Court of Appeals of New York held that the right to receive alimony could not be alienated.

The doctrine which we urge is neither novel nor unusual. Some instances cited are based on protection to the public rather than to the individual or the class covered by the rule. In others, it is the benefit to the individual as a member of the class which provides the foundation for the rule of policy. The principle, we submit, is the same. Within the realm of its legislative power, Congress may impose restrictions upon the right of individuals to contract, and in some cases even to the extent that their freedom to be improvident is curtailed.

B. The doctrine that the law favors alienability of property lends no support to the contention that the renewal may be disposed of by an author in advance of the twenty-eighth year. The statute is so framed that at no time before the twenty-eighth year can a complete title be conveyed.

We have referred above to the statutory limitations which make it impossible for an author to sell or an assignee to acquire a complete title to the renewal in advance of the specified year. The holding that an author may bar himself from the financial benefits of the privilege does not make the renewal itself alienable. All that the author can sell is the possibility that he will survive.

These are drastic restrictions admittedly imposed by the statute and which are not made substantially more onerous by permitting one interest out of many to be forestalled.

We respectfully urge that the test of the alienability favored by the law is that which permits a complete title to be transferred by persons in being who, joining together, may make an absolute conveyance.

See: *Goesele et al.* v. *Bimeler*, 55 U. S. (14 How.) 589, 608;

Ladd, as Trustee, etc. v. *Mills*, 20 Fed. 792, 794; *Hammerstein* v. *Equitable Trust Co.*, 156 App. Div. 644, aff'd 209 N. Y. 429.

If the factor of alienability be a consideration in determining the intent of the statute, we submit that the logic is against the decision in the Court below. Congress, by failing to make the property completely alienable, has indicated a purpose to prevent an author from disposing of it.

POINT IV

The case is one of first impression.

The present case is the first under the Copyright Law of 1909 to pass directly upon the validity of an agreement by a surviving author to assign his renewal in advance of its accrual. The question remained unadjudicated under the various statutes enacted in and after the year 1831. Three early cases, *Paige* v. *Banks*, 80 U. S. (13 Wall.) 608, *Cowen* v. *Banks*, 24 How. Pr. 73 and *Pierpont* v. *Fowle*, 2 Woodb. & M. 23, 19 Fed. Cas. 652, are however sometimes referred to as authority that such an assignment is valid.

Although these cases were decided after 1831 and the renewals referred to registered under that Act, they actually involved rights which had already been vested in the assignee under the Act of 1790, which by its terms made the renewal available to the assignee and authorized him to record it in his own right.

In *Paige* v. *Banks*, the assignment of the author's right, title and interest had been made in 1828. In *Pierpont* v. *Fowle*, the agreements had been made on July 21, 1823 and on July 12, 1827, respectively. In *Cowen* v. *Banks*, the assignee's rights had likewise vested before the enactment of the Copyright Law of 1831.

This distinction was pointed out by Judge Putnam in *White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247, at 253, in the following language:

> "On examining Paige v. Banks, as reported in 13 Wall., it appears at page 609 (20 L. Ed. 709) that the contract on which the publisher relied was made in 1828, when the act of 1790 was in force, and when no rule of public policy such as we have explained existed or had been declared."

See also:

28 Ops. Atty. Gen. 162, at 168.

Furthermore, it appears from the report of *Pdige* v. *Banks*, 80 U. S. 608, at 616, that Mr. Paige had asserted a claim to the renewal in 1858. The defendant at that time claimed as an alternative to the ownership under the original agreement, an unlimited license to publish and sell (p. 610). Mr. Paige made no further objection. It was not until ten years later, after Mr. Paige had died, that his executors filed a bill for injunction. It would seem that this acquiescence after the renewal had been perfected was sufficient to defeat the bill on the ground of laches or estoppel.

The observations of the Court in *Pierpont* v. *Fowle*, 2 Woodb. & M. 23, 19 Fed. Cas. 652, were by way of dictum since the ultimate decision was that the author had not sold the renewal to the defendant.

Another case sometimes referred to as justification for enforcing these contracts is *Carnan* v. *Bowles*, 2 Bro. C. C. 80, which was decided in 1786 and construed an early English statute, 8 Anne c. 19. That Act was there considered as providing a reversion by way of recapture in favor of the author at the end of fourteen years. The second fourteen year period of copyright, contingent upon the author's survival, was not considered to be a new grant, but the "return" of a portion of a larger grant.

In this respect, the entire concept of the English law was different from that which underlies Section 23 of the Copyright Law of 1909 and its predecessors since 1831. It is well settled that the renewal is under our statute a new grant not dependent on ownership of the original copyright.

Fox Film Corp. v. *Knowles*, 261 U. S. 326;
White-Smith Music Publishing Co. v. *Goff*, 187 Fed. 247.

The danger of arguing from the English cases is demonstrated by the difference in the development of the English Copyright Law as compared to that of the United States. Although the Statute of Anne had contained no reference to assignees, the amendment adopted in 1814 made specific provision for them. The Statute (54 George III, c. 156, p. 817) provided (§ IV, p. 820):

> "from and after the passing of this Act, the author * * * *and his assignee or assigns*, shall have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, * * * and also, if the author shall be living at the end of that period, for the residue of his natural life." (Italics ours.)

The law in this country, as we demonstrated in Point II of this brief, took an opposite course. The Statute of 1790, by its express language, entitled the assignee of an author to take the renewal. The revision of 1831, in contrast to the earlier Act and to the development in the English law, excluded the assignee and limited the right of renewal to the author and his family.

The text books on Copyright Law present a confusing picture. The writers are substantially in agreement that under the statutes since 1831, the privilege of applying for the renewal is personal to the author and may not be assigned; also, that an assignee may not file an application in his own behalf.

Drone on Copyright, 261;

Weil, Law of Copyright, 365;
Bowker, Copyright, Its History and Its Law, 114, 117;
Curtis, The Law of Copyright, 234;
2 Morgan, The Law of Literature, 227;
MacGillivray, The Law of Copyright, 267, 268;
Marchetti, The Law of Stage, Screen and Radio, 66;
2 Ladas, The International Protection of Literary and Artistic Property, 772;
Howell, Copyright Law, 101, 107;
Wittenberg, Literary Property, 45;
Amdur, Copyright Law and Practice, 532;
Frohlich & Schwartz, Law of Motion Pictures and The Theatre, 548;
De Wolf, Outline of Copyright Law, 65.

The discussions relate to the problems whether and how the same result may be accomplished by indirection. Prior to 1909, the views expressed varied. Some writers advanced the theory that the author might dispose not only of his own renewal, but also of that to which his widow and children might become entitled; others denied the ability of the author to impair the privileges of his widow or children; still others reach the conclusion that if an author sold his work outright, the renewal vanished and neither the author nor his assignee might avail himself of the privilege. Of importance are not only the conclusions arrived at, but also the reasoning by which they are reached.

The most elaborate discussion appears in Drone on Copyright (1879) before Congress had expressed itself so forcibly in the Committee Report of 1909. We have already referred to his statement that (p. 327):

> "The provision under consideration was, doubtless, intended to secure to the author and his family a

privilege which is not given directly to an assignee; but *it is not reasonable to suppose* that the object of the statute was to reserve to the author or his family any rights with which he has voluntarily parted, and for which he has received and enjoyed the consideration." (Italics ours.)

Upon this premise, Drone predicated the conclusion that the author could divest not only himself of the renewal privileges, but that he could defeat the interest of his widow and children as well. He says (p. 326):

"Author may Divest Himself and Family of Right to Renewal.—It may be claimed that the provision of the American statute above referred to was intended for the personal benefit of the author or of his family. It is reasonably clear that the copyright for the additional term will vest only in the author, if he be living. But there appears to be no reason why he may not divest himself of the right thus reserved for him, either by parting absolutely with his entire interest in a work, or by an agreement to convey the copyright for the additional term when it shall be secured. In the former case, he has no interest in the work, and cannot rightly claim the additional privilege guaranteed to him by the statute. In the latter case, he is bound by his agreement to transfer to another the right when it shall be secured to him. *The principle is the same in case the author be not living at the end of the first term.* Then the copyright for the additional term will vest only in his widow or children. But their rights are dependent on his. Their title is derived from him, and stands or falls with his. There must be a good foundation on which to rest their claim. If the author has parted with his absolute property in the work, and could not, if living, himself secure the copyright, it seems to be clear that his representatives are equally incapable of securing it, for the reason that the work does not belong to them. So, when he has bound himself to assign his future term, there is no reason why such agreement should not be equally binding on

them after his death, unless there is in it some condition or other circumstance to warrant a different construction." (Italics ours.)

MacGillivray, The Law of Copyright (1902), after expressing merely a doubt whether the right to obtain an extension was assignable under the statute, and saying that a contract to assign the renewal would be valid, then makes a distinction between conveyances of published and unpublished works. In the latter case, his solution is that the renewal vanishes completely. He writes (p. 268):

"If the author of an unpublished work conveys all right, title, and interest in it to another, he certainly cannot take out an extended term to run against his grantee. It seems doubtful whether he can take it out at all. Certainly, his grantee cannot, and probably the author could not for his benefit."

Curtis on Copyright (1847) states without reference to authority that the author may undoubtedly assign his contingent interest, but that he cannot defeat the rights of his widow or children, should he fail to survive. He says (p. 235):

"It is not easy to see how the author can dispose of this interest. It is not created for him, but for his family; it vests only in case of his death, *and the policy of the statute*, it seems to me, has removed it from his control." (Italics ours.)

In 2 Morgan, The Law of Literature (1875), we find the recognition at page 227 that the renewal is a new interest and that it "looks entirely to the author and his family, not to assignees." Strangely, however, the author seems to believe that the statute may be disregarded by a court of equity and that the assignee might be "entitled to be protected in it, in *equity*, rather than according to any mere *technical rule of law*." (Italics ours.)

Drone's concept that the statute could not reasonably have intended to preserve rights after an author has parted with them, and that the renewal is but an appendage to ownership of the work for the original term of copyright, has been repudiated both by Congress and by the courts. As we have attempted to show earlier in this brief, there is no basis in the statute to warrant a construction that the limitations were intended to safeguard the widow and children alone, and were not inserted to protect the author against his own improvidence. The stress in the Committee's Report of 1909 is laid upon the very necessity of providing a safeguard to the author himself against improvident sales.

At first blush, the reasoning of these earlier authors seems entirely plausible. Upon analysis, it becomes apparent that they disregard the basic premise that the subject matter is a statutory privilege. It can hardly be said that a statutory policy is to be treated as a "technical rule of law", one which may be overridden in "equity". The attempted distinction between the sale of the "work" before publication, and the sale of the "copyright", loses sight of the fact that it is the "copyright" which is in issue. That right is separate and distinct from the tangible object itself and likewise distinct from the common law property which it supersedes.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 301.

When a publisher copyrights a work or deals with copyright property, and thus avails himself of the privileges of the statute, he subjects himself to its limitations as well.

Weil, who wrote after 1909, addressed himself to the very nub of the controversy. Referring to Drone's premise, he says (Weil, The Copyright Law, p. 367):

"* * * The difficulty with this argument is that it fails to recognize that the rights involved are purely statutory, and hence dependent not on the ownership of a work, not on authorship, but on the statute. Authorship furnishes the foundation for the legislation under which copyrights are granted, but it does not furnish the measure of rights granted by the statutes. The distinction is between the occasion for, and the results of, legislation."

A number of writers after 1909 expressed doubt concerning the validity of contracts by which authors attempted to alienate their renewal privilege.

As the majority opinion below indicates, Weil definitely "hedged" on the validity of an anticipatory sale of a renewal by the author. He said (p. 365):

"* * * If the author be living when a copyright expires, *he may, it seems,* be compelled *in a proper case,* to assign the renewal copyright to the proprietor of the original copyright, if the contract between them so provided." (Italics ours.)

Bowker, who participated in the conferences which led to the formulation of the 1909 Law (Copyright, Its History and Its Law, vi) and whose book appeared in 1912, displays a complete lack of certainty. He says (p. 114):

"The new code differs in making the renewal period a second twenty-eight years and extending the right of renewal to the executors or next of kin and to the proprietors of composite or other impersonal works; but it still denies renewal to assignee proprietors of personal works."

Again at page 117:

"No contract on the part of an author can give a publisher the right to claim copyright renewal under the new code, although a contract to make claim for the renewal period and transfer the copyright for the

renewal period to the publisher, *might be* enforced by the courts through a writ requiring the author to enter such claim and assign the renewed copyright in accordance with the contract." (Italics ours.)

Finally, at page 118:

"Where an author has sold 'outright' all his right, title and interest in his work, it is possible that this may estop him from application for renewal or invalidate a renewal; but this question must be decided by the courts when a case arises. It is important that any contract between author and publisher should be clear and specific *on this vexed question of* rights for the renewal term." (Italics ours.)

De Wolf, Outline of Copyright Law (1925), is equally hesitant. He says (p. 66):

"It will be seen that, although the renewal copyright is a new copyright, and not merely the continuation of the original copyright, yet the policy of the law is that it shall go to the author or to his relatives. It cannot in any case go to an administrator, for the general benefit of the author's estate, or for the payment of his debts. Much less can it go to an assignee of the author. (*White-Smith Publishing Co.* v. *Goff*, 187 Federal Reporter, 247.) Contracts between authors and publishers were formerly often made, by which the author undertook to grant not only the right to obtain the original copyright, but also the right to renew. *It may be* that if the author is living when the time for renewal arrives, he can be compelled to carry out the terms of his contract by taking out the renewal in his own name and then assigning it without further compensation to the publisher. But if he dies before the time for renewal registration arrives, i. e., before the beginning of the last year of the original twenty-eight year term, his obligations die with him, so far as the copyright law is concerned. His widow, or children, are not bound by his agreement and they receive the renewal copyright free of all incumbrance." (Italics ours.)

Mr. Howell (The Copyright Law, 1942), formerly Assistant Register of Copyrights, after citing the rule in the present case (p. 108), hastens to add at page 109:

> "The renewal right being personal to the author, if is doubtful whether, in the event of his dying before the statutory year arrives, the widow or children could be bound by having joined in any such contract. This would plainly be contrary to the general policy of the Act, and enable the author to accomplish indirectly what he is not permitted to do directly."

Ladas, 2 International Protection of Literary and Artistic Property, 772 (1938), and Wittenberg, Literary Property, 45 (1937), merely accept the proposition that an author may assign the renewal by contract.

Frohlich & Schwartz, The Law of Motion Pictures and The Theatre (1918), call attention (p. 549) to the difficulty of obtaining a decree in a court of equity within one year if the author refuses to renew the copyright.

Marchetti, Law of Stage, Screen and Radio, 67 (1936), relying entirely upon Drone, reverts to the proposition that an outright sale of the work will convey the renewal although an assignment of the "copyright" might be limited to the first twenty-eight years.

The later writers who accept the doctrine of assignability, do not seem to have given any consideration to the reasons which in 1909 motivated Congress to retain the renewal pattern. They do not attempt to discuss the policy of the statute. Those writers, such as Weil, De Wolf, Bowker and Howell, who give consideration to the question of statutory policy, are obviously troubled about the incongruity of recognizing an assignment of the substance of the renewal application when Congress sought to prevent that result.

In the Court below, reference was made (R. 75) to a strong dictum in the case of *Tobani* v. *Carl Fischer, Inc.*, 98 Fed.

(2d) 57, cert. denied 305 U. S. 650. There, the question was whether Tobani's works had been written "for hire". The Court found this to be the fact and that Tobani's family did not have the privilege of filing the renewal.* The works produced by Tobani came, therefore, within that class of impersonal works in respect of which the proprietor alone might file the application. The Court moreover held that no proper application had been filed and the renewals obtained by Tobani's family were, therefore, nullities. In the course of his opinion, Judge Manton, wholly unnecessarily, we submit, reverted to Drone's theory that an author who sells his work outright retains no interest upon which to predicate a right to renew the copyright. As Judge Frank indicated in his dissent below (R. 90), the force of the *Tobani* case has been weakened by a later opinion—*Shapiro, Bernstein* v. *Bryan*, 123 Fed. (2d) 697, 700.

It is sometimes said that an opinion rendered by the Attorney General in 1910 (28 Opinions Attorneys General 162) is forceful authority that an agreement to assign the renewal is unenforcible.

There had been presented to the Attorney-General questions relating to the right of assignees to file applications for renewal. These applications were of two classes (p. 162):

> "(1) Applications made by assignees under direct assignments of the renewal or extension term from the persons named in the statute as entitled to renewals or extensions.
>
> "(2) Applications made by assignees who purchased the copyrighted work, either when the original copyrights were secured or subsequent thereto, and who also took assignments of the copyrights."

* Although the exception does not appear in Section 24 under which the *Tobani* case arose, the Court read into that section a definition of "author" which appears in Section 62.

It was the Attorney-General's opinion that none of the applications could be accepted. He said (p. 170):

> "The applicants here in question are the owners of the works by purchase, and assignees of the original copyrights, and in some cases, have taken assignments of the renewal terms. But in neither case does the statute authorize the extension to be made in the name of the assignee, and the applications should, therefore, be disallowed."

In the course of his discussion, the Attorney-General made the observation that the rights in the renewal might be the subject of a valid contract which would carry the equitable, if not legal, title. He pointed out, however (p. 169):

> "It is not intended in this opinion to determine any question of law which relates to the relative rights of authors and their assigns, and such rights are mentioned only by way of illustration or argument."

In the light of the disagreements amongst the writers, particularly concerning the intent of the statute, it cannot in justice be said that their views settled the law on the enforcibility of an author's agreement disposing of his renewal in advance of the twenty-eighth year of the first term. The reluctance on Drone's part to recognize the policy enacted into the statute must now be disregarded. The attempts of some writers to differentiate between the right to alienate the privilege of filing the application and the right to dispose of beneficial ownership of the renewal before the application is filed, is too tenuous for acceptance to defeat a statutory policy. Similarly, argument that the sale of a "work" before publication conveys the renewal and a sale of the "copyright" does not, seems to be a distinction without a difference. The theory that the statute was intended to safeguard the author's widow and his children and not the author himself finds no basis in the statute or in the Committee's Report. All

of these shadings of interpretation, based on so-called equitable principles, are in reality but a refusal to recognize the Congressional policy and another way, perhaps unconsciously, of phrasing Drone's argument that it is not reasonable to suppose Congress intended to make the renewal inalienable.

We respectfully submit that Congress recognized or assumed that authors are improvident individuals, prone to bargain away for a mere pittance valuable economic rights in their artistic creations. Desiring to insure to authors financial benefits from their writings, Congress, in Section 23, created two separate and distinct terms of copyright, each enduring for a period of twenty-eight years. By limiting to the author and his family the right to secure the second or renewal term, Congress intended to make certain that the author and his family would, at the expiration of twenty-eight years, obtain the financial benefits of the renewal term. In order to make effective this Congressional purpose, Section 23 must be construed as rendering invalid and unenforceable any agreements entered into by the author prior to the twenty-eighth year alienating the beneficial ownership of the renewal copyright. Any other construction completely frustrates the Congressional intent to protect the author and his family, and makes utterly meaningless the statutory purpose in creating two separate terms of copyright, and limiting the privilege of renewal to the author and his family.

POINT V

The interlocutory judgment appealed from should be reversed; the decree *pendente lite* vacated and set aside; and the case remanded with instructions to deny respondent's motion for a temporary injunction.

Respectfully submitted,

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APPENDIX A

Statute Involved

Section 23 of the Copyright Law reads as follows:

"*Duration; renewal.* The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered,* the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within

* The clause "when such contribution has been separately registered" was deleted by Act of March 15, 1940, c. 57, 54 Stat. 51. Otherwise, the Section has remained unchanged since 1909.

one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. (Mar. 4, 1909, c. 320, § 23, 35 Stat. 1080.)"